IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.67 OF 1990

Eknath Dnyandeo Patil)
Resident of Mhalsawade)
Taluka Karvir,)
Dist. Kolhapur) ...Appellant.

V/s

The State of Maharashtra) ...Respondent.

Mr. A.P. Mundargi for the appellant.

Mr. D.P. Adsule for the State.

CORAM: V.M.KANADE,J.

DATE: 26th October, 2004.

ORAL JUDGMENT:

1. Appellant is challenging the Judgment and Order passed by the IIIrd Additional District & Sessions Judge, Kolhapur in Sessions Case No.147 of 1987. By the said Judgment and Order dated 06/02/1990, the Trial Court convicted the accused for having committed an offence under section 304 Part I of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for five years and to pay fine of Rs 2,000/- and, in default, to suffer simple imprisonment for three months and further convicted him under section 324 of the I.P.C. and sentenced him to suffer R.I. for one month and to pay fine of Rs 5000/- and, in default, to suffer simple imprisonment for 15 days.

2. Respondent - accused alongwith six other accused was charged under sections 147, 148, 302 read with sections 149, 307 read with sections 326, 506 of the I.P.C. for having formed an unlawful assembly and committed murder of Mahadev Yashwant Patil and having tried to commit murder of Laxman Yashwant Patil.

3. Brief facts are that, the complainant was staying alongwith his family and relatives at village Mhalsawade, Taluka Karvir, District Kolhapur. The appellant - accused was also staying in the same village. It was alleged that two years before the incident, the father of the accused No.1 - appellant herein had borrowed four bags of paddy from the uncle of the complainant and the said bags of paddy were not returned, though the demand was made by the complainant. The accused was annoyed and he abused the complainant. Thereafter, on the next day i.e. on 24/09/1987, the accused stopped his Moped after having seen the complainant and assaulted him with a knife. The complainant raised hue and cry, as a result his brother Mahadev came to the spot and questioned the appellant herein as to why he had assaulted the complainant. According to the complainant, accused Nos. 2 to 5 and 7 came there along with sticks. At that time, accused No.1 gave a blow on the back of

Mahadev Yashwant Patil with a knife who was, thereafter, taken to the hospital. However, he succumbed to the injury and died. Investigation was made by the police and the Charge-sheet was filed. The Trial Court acquitted the original accused Nos. 2 to 7. However, the Trial Court convicted accused No.1 - appellant herein.

4. The learned Counsel appearing on behalf of the appellant submitted that there was a discrepancy in the evidence of the prosecution witnesses. He submitted that the genesis of the offence was not established by the prosecution as the prosecution witnesses had failed to establish and explain as to how the injuries were caused on the person of accused No.1. He submitted that the evidence given by the prosecution witnesses was not cogent and reliable and, therefore, on account of non-explanation of injuries on the person of the accused, the Prosecution's case was not proved beyond the reasonable doubt and, therefore, the accused was liable to be acquitted. He relied upon the Judgment of the Apex Court in support of the said submission. He further submitted that the motive, as alleged by the prosecution, was improbable and, in fact, real motive was that the accused and the complainant belonged to two different groups and there

was, admittedly, an enmity between two groups on account of political rivalry and, therefore, the prosecution had failed to bring on record the real cause and motive behind the said incident. He submitted that, in fact, from the evidence on record, it could be gathered that the accused was not aggressor and the complainant had falsely implicated the accused. He submitted that the evidence of each of the prosecution witnesses contradicted the version of each other and, as such, the entire prosecution case itself cannot be relied upon.

5. The learned APP appearing on behalf of the State submitted that the evidence of the complainant and the other witnesses who had seen the incident in question corroborated each other on material facts. He submitted that the presence of the accused was established and even otherwise the accused had not denied his presence at the scene of offence. The complainant himself was seriously injured and his brother died as a result of the blow given by the appellant on his back. He submitted that there was no reason to interfere with the said judgment and order passed by the Trial Court.

6. Prosecution has examined 15 witnesses out of which P.W.3 - Laxman Yashwant Patil, P.w.7 - Shamrao Keshav Patil, P.W.8 - Rangrao Shamrao Patil, P.W.9 - Maruti Ganpat Patil and P.W.10 - Krishna Govind Patil are examined as eye witnesses. The defence of the accused is of total denial. He submitted his written say. P.W.3 - Laxman Yashwant Patil has stated in his evidence that the father of the accused had borrowed four bags of paddy on the occasion of marriage of accused No.1 about two years before the incident. He has stated that he and others had demanded the paddy but accused No.1 had not returned it.He has stated that his uncle Shamrao had demanded the said paddy from the father of the accused No.1 through the uncle of accused No.1. He has stated that on the next day when his uncle was going to his field there was altercation between his uncle and accused Nos. 1 and 5. However, no complaint was lodged. According to the complainant on 24//9/1987, the accused No.1 came on his Moped and threatened him as to why he had demanded paddy. There was exchange of abuses on both sides when the accused took out a knife from his pocket and gave its blow on his left chest. He raised a cry and fell down. His brother Mahadev came out of the house and questioned the accused as to why he had assaulted Laxman. According to the complainant, 2/4

persons from the house of Sadu Patil came there and Sadu Patil caught his brother Mahadev and accused No.1 gave blow of knife on the back of Mahadev. Thereafter, Mahadev was taken to the hospital where he expired. P.W.5 - Dhanaji Baburao Nikam who was also examined as an eye witness turned hostile and was declared as hostile. P.W. 7 - Shri Shamrao Keshav Patil was also examined as an eye witness who also deposed about four bags being given to the accused. He has stated that on the date of the incident, he was in his house and there was some quarrel outside and he and Mahadev, therefore, came out of the house. He saw that Laxman was lying down. He has stated that Sadu Patil held Mahadev with his hands and accused No.1 gave a knife blow to Mahadev. P.W. 8 - Rangrao Patil was also examined as an eye witness. He has also deposed that he has seen that Sadashiv Patil had caught Mahadev and blood was oozing from the back of Mahadev. He has stated that the accused were at the spot and accused Nos. 4 and 6 were abusing and all the accused were having sticks. P.W. 9 - Maruti Patil has deposed that the accused gave a knife blow on the chest of Laxman. At that time, Mahadev came to the spot and, at the same time, accused Nos. 2 to 7 also came to the spot. Accused No.1 gave a knife blow on the back of Mahadev. He has stated that after

assaulting Mahadev, accused No.1 started his Moped. However, Shamrao Patil obstructed the Moped of accused No.1 and, therefore, accused No.1 fell down from his Moped. Thereafter, he ran away leaving his Moped at the spot. P.W.10 - Krishna Govind Patil has also stated that while he was passing the Margubai temple, he saw that Laxman and Eknath were quarrelling and accused No.1 gave knife blow to Laxman and, as a result, Laxman fell down. Mahadev came to the spot. Accused Nos. 2 to 7 also came to the spot and Sadu Patil caught Mahadev and accused No.1 gave a knife blow on the back of Mahadev and, at that time, Shamrao and Rangrao came to the spot.

7. From the evidence of these witnesses, it can be seen that they have given different versions about the role played by accused Nos. 2 to 7. There is a discrepancy in the evidence of these eye witnesses regarding time and place as to when the accused Nos. 2 to 7 came to the spot as also regarding there presence at the scene of offence. However, these witnesses have deposed that appellant gave one blow to Laxman on his chest and one blow to Mahadev on his back. P.W.11 - Dr. Raghuji Dinkarrao Thorat has been examined by the prosecution to prove the injuries on Laxman Patil and Eknath Patil i.e. the appellant

herein. P.W. 11 has stated that there was 1 incised wound over left side of chest of Laxman Patil 2 c.m. in length and 1 c.m. mid length which was muscle deep. He has also stated that he had examined accused No.1 - Eknath Patil i.e. the appellant herein and had found two injuries i.e. (1) incised wound over left lateral canttus 2 c.m. x 2 c.m. 1/2 c.m. size bone deep and (2) Contusion over left forearm external aspect 1 c.m. x 8 c.m. size. He has further deposed that the injury No.1 was caused by sharp cutting object and injury No.2 by blunt and sharp object. In his cross-examination, he has stated that if the tin of an axe is very sharp then it is possible to cause injury No.1 which was found on the person of Laxman. Thus, from the evidence of P.W.11 it is established that the accused was also injured in the said incident. Similarly, prosecution has also examined Dr. Zunzarrao Patil who had performed the post-mortem of deceased Mahadev Patil. He has stated that there were two injuries on the person of the deceased i.e. (1) incised wound on the left lateral eyebrow 1 c.m. x 1/2 c.m. bone deep and (2) incised wound (stab wound) 2.5 c.m. deep in breadth and 3 c.m. deep on the right lateral to the vertibra column and internal injury was found and there was penetrating puncture on the right lobe of lung on the same level. Thus, from

the evidence, it can be seen that the prosecution witnesses have not stated as to how the injury was caused to the accused. It is an admitted position that the cross complaint was filed by the Appellant and the Complainant and others were arrayed as accused in the said case. However, the trial Court acquitted the complainant and others in the said cross case which was filed by the accused. Thus, in the absence of any explanation being given by the prosecution witnesses regarding the manner in which the injury was caused to the accused which does create doubt regarding origin of the occurrence and doubt is created in the mind that the prosecution has suppressed the genesis of the offence. The Apex Court in the case of **Lakshmi Singh and Others vs. State of Bihar** reported in **(1976) 4 SCC 394** has observed in para 12 as under:-

> "12.....
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> It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the

court can draw the following inferences:

(1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case."

The Apex Court, however, also observed in said paragraph no.12 as under:-

"We must hasten to add that as held by this Court in State of Gujarat v. Bai

> Fatima (supra) there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. The present, however, is certainly not such a case, and the High Court was, therefore, in error in brushing aside this serious infirmity in the prosecution case on unconvincing premises."

This view of the Apex Court is reiterated in subsequent judgment in the case of **Sekar Alias Raja Sekharan V/s State represented by Inspector of Police, T.N.** reported in **(2002) 8 SCC 354**. The Apex Court, while discussing the issue regarding the injuries which are found on the accused, has observed in para 8 of the said Judgment as under:-

"8. The number of injuries is not always a safe criterion for determining who the aggressor was. It cannot be stated as an universal rule that whenever the injuries are on the body of the accused persons, a presumption must necessarily be raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused on the accused probabilises the version of the right of private defence. Non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. But mere non-explanation of the injuries by the prosecution may not affect the prosecution case in all cases. This principle applies to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so

probable, consistent and creditworthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries (See Lakshmi Singh Vs. State of Bihar). A plea of private defence cannot be based on surmises and speculation. While considering whether the right of private defence is available to an accused, it is not relevant whether he may have a chance to inflict severe and mortal injury on the aggressor. In order to find whether the right of private defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting. Section 97 deals with the subject-matter of right to private defence. The plea of right comprises the body or property (i) of the person exercising the right; or (ii) of any other person; and the right may be exercised in the case of any offence against the body, and in the case of offences of theft, robbery, mischief or criminal trespass, and attempts at such offences in relation to

property. Section 99 lays down the limits of the right of private defence. Sections 96 and 98 give a right of private defence against certain offences and acts. The right given under Sections 96 to 98 and 100 to 106 is controlled by Section 99. To claim a right of private defence extending to voluntary causing of death, the accused must show that there were circumstances giving rise to reasonable grounds for apprehending that either death or grievous hurt would be caused to him. The burden is on the accused to show that he had a right of private defence which extended to causing of death. Sections 100 and 101 IPC define the limit and extent of right of private defence."

The ratio laid down by the Supreme Court in the case of Laxmi Singh (supra) therefore is that if the prosecution witnesses have not stated or explained the presence of injuries on the person of the accused, the inference which could be drawn was either the prosecution has suppressed genesis of the offence or

that the prosecution witnesses were lying on material point and, therefore, their evidence was unreliable and, thirdly, defence version was rendered probable on the most material point. However, that by itself would not affect the prosecution case in cases where the evidence was clear and cogent, independent and disinterested, probable, consistent and creditworthy. Thus in a case where injuries are found on the person of the accused and they are not explained by the prosecution coupled with the fact that the evidence of the prosecution is clear and cogent, independent and disinterested then the prosecution case would still not be affected by the said non-explanation. However, if the injuries are not explained and the evidence of the prosecution is not consistent or witnesses are interested then the benefit of doubt would go to the accused. In the light of the said ratio laid down by the Supreme Court, we will have to examine the facts of this case.

8. In the present case, injury on the person of the accused has not been explained by the prosecution. The said injury is also not a simple injury since it is incised wound as stated by the P.W. 11 - Dr. Raghuji Thorat. At the same time, prosecution witnesses have consistently stated that the accused

No.1 assaulted P.W.3 Laxman on the chest and the deceased Mahadev on the back. The role attributed to accused Nos. 2 to 7 has been stated by different eye witnesses in a different manner. The accused in his written say has stated that he alongwith his cousin Sunjay and daughter Ujwala were coming towards Kolhapur from their village on his Moped T.V.S. 50 and his wife was coming on foot behind them. When they came near Margubai temple, Shamrao Patil, Laxman Patil and Mahadev Patil were in front of their house and Shamrao was having an axe and Laxman and Mahadev were having sticks. He has further stated that Laxman came and gave stick blow on his left hand, as a result of which he and his cousin fell down. Thereafter, Mahadev gave 2/3 stick blows on his back and Shamrao Patil gave an axe blow on his eye. Other persons also came and instigated Mahadev and Laxman to beat him.

9. It is thus probable that the accused assaulted Laxman and Mahadev while trying to save himself and Laxman and Mahadev received one blow of knife which was given by accused No.1. The fact that the accused gave one blow with his knife to Laxman on his chest and Mahadev on his back has been stated consistently by all the eye witnesses. Thus, in my view, prosecution has proved the assault by accused No.1 on

Laxman and Mahadev. The Trial Court, however, has rightly come to the conclusion that there was no intention on the part of accused No.1 to kill Mahadev or to cause such injury which was likely to cause death. However, from the evidence on record, it can be seen that it is probable that accused acted in self defence which can be seen from the various circumstances which are brought on record by the prosecution. It is now a settled position in law that even if the right of private defence is not specifically taken up by the accused during trial, if the circumstances indicate that he had acted in his right of private defence then such a benefit can and should be given to the accused. In the present case, however, looking at the nature of the injuries which are caused to Mahadev, it can be said that the accused has exceeded in his right to private defence. The conviction of the accused under section 304 Part-II of the I.P.C., therefore, will have to be upheld.

10. So far as the question of sentence is concerned, in my view, this is a fit case where Trial Court ought to have convicted the accused under section 304 Part-II instead of section 304 Part-I of the Indian Penal Code. The conviction under section 304 Part-I of the I.P.C. is set aside. The conviction under

section 324 of the I.P.C. is set aside. Appellant, however, is convicted under section 304 Part-II of the I.P.C. However, in the instant case, in my view, benefit of section 4 of the Probation of Offenders Act should be given to the accused. The genesis of the offence has not come on record. The presence of the accused at the scene of the offence has been established. However, it is difficult to come to the conclusion as to who was the aggressor or the person responsible for starting the fight. The accused also was grievously injured in the said incident and cross cases were filed against the complainant and other witnesses. The incident in question has taken place in the year 1987. The accused is now 45 years old. During last 18 years, he is not involved in any other offence.

11. Under the peculiar circumstances of the case, the appellant will have to be released on probation of good conduct on his executing a bond of good behaviour for a period of six months. The ends of justice would be met if the appellant-accused is directed to pay compensation to the father of the deceased Mahadev under section 5 of the Probation of Offenders Act.

Section 5 of the said Act reads as under:-

"5. Power of Court to require released offenders to pay compensation and costs.- (1) The Court directing the release of an offender under Sec.3 or sec. 4, may if it thinks fit, make at the same time a further order directing him to pay -

(a) such compensation as the Court thinks reasonable for loss or injury caused to any person by the commission of the offence; and

(b) such costs of the proceedings as the Court thinks reasonable.

(2) The amount ordered to be paid under sub-section (1) may be recovered as a fine in accordance with the provisions of Secs. 386 and 387 of the Code.

(3) A civil court trying any suit, arising out of the same matter for which the offender is prosecuted, shall take into account any amount paid or recovered as compensation under sub-section (1) in awarding damages."

The appellant was convicted by the Trial Court under section 304 Part-I of the I.P.C. and was sentenced to undergo R.I. for five years. The said conviction is now altered to section 304-II of the I.P.C

12. Accordingly, the following order is passed:-

O R D E R

. Appeal is partly allowed.

. Conviction of the appellant under section 304 Part-I is set aside. Conviction under section 324 of the I.P.C. is also set aside. The appellant is however convicted under section 304 Part-II of the I.P.C. The appellant is given the benefit of section 4 of the Probation of Offenders Act and considering the peculiar circumstances of the case, he is released on probation of good conduct and he is directed to execute a bond of good behaviour for a period of six months. The appellant is however directed to pay compensation to the father of the deceased Mahadev and/or his next of kin of an amount of Rs 50,000/- to be paid within eight weeks from today. The said amount to be deposited in the trial court and the trial court to disburse the amount to

the next of kin of Mahadeo Patil of village Mhalsawade, Taluka Karvir, District Kolhapur.

. Appeal is allowed in the above terms.

. Certified copy is expedited.

. Bail bonds to stand cancelled on depositing the amount of compensation.

V.M. KANADE, J.